
(1992) 05 MP CK 0006

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition 533 of 1992

A and A Enterprises

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 08-05-1992

Acts Referred:

Commissions of Inquiry Act, 1952 — Section 11, 3, 3(3), 7, 8A(2)
Constitution of India, 1950 — Article 226, 227

Citation : (1992) JLJ 572 : (1993) 38 MPLJ 104 : (1993) MPLJ 104

Hon'ble Judges : S.K. Jha, C.J.; D.M. Dharmadhikari, J

Bench : Division Bench

Advocate : N.S. Kale, S.K. Sibbal, Fakhruddin and R. Shrivastava, for the Appellant; N.C. Jain, for the Respondent

Final Decision : Allowed

Judgement

D.M. Dharmadhikari, J.

A common order in being passed in this petition and Misc. Petition No. 481 of 1992 Ajay Singh s/o Shri Arjun Singh v. State of Madhya Pradesh and Ors., which is on the same subject matter.

This petition arises in the course of a Commission of Enquiry known as Churhat Lottery Commission. The petitioner challenges notification dated 9-1-1992 (Annexure-M), appointing Hon"ble Shri Justice Kamalakar Choubey, retired Judge of Allahabad High Court as the sole member of the commission in substitution of Hon"ble Shri Justice G. G. Sohani, retired Chief Justice of Patna High Court, who resigned from the membership of the commission. The two notifications of appointment of Justice G. G. Sohani and thereafter Hon"ble Shri Justice Kamalakar Choubey, have resulted in the ouster of Hon"ble Shri Justice S. T. Ramalingam, the then sitting Judge of Madras High Court (now retired) from membership of the Commission.

In a public interest litigation initiated by Shri Kailash Joshi (who is the intervener

in this petition, leader of the opposition party at the time and presently a cabinet minister in the Ministry headed by the ruling Bhartiya Janata Party in the State of Madhya Pradesh), the High Court in *Kailash Joshi v. State of M. P. and Ors.*, Misc. Petition No. 3909 of 1987 decided on 20-1-1989, reported in 1989 JLI 127 had issued writ or directions for setting up an "Independent High Power Agency" to hold an enquiry into the affairs of Churhat Children's Welfare Society and the lottery conducted by it. The present petitioner was an agent appointed to organise the lottery on behalf of the Churhat Children's Welfare Society. The petitioner in the connected petition (M. P. No. 481 of 1992) is one of the office bearers of the aforesaid society.

In compliance with the writ or directions of the High Court in the aforesaid Churhat lottery case, the State Government passed a resolution on 24-2-1989 (Annexure-A) and issued a notification of the same date (Annexure-C), setting up an enquiry to be conducted by Hon"ble Shri Justice S. T. Ramalingam, the then sitting Judge of Madras High Court, describing it "Independent High Power Agency", to investigate into the affairs of the society and the lottery conducted by it. Specific terms of reference were framed in the notification, and the time for completion of the enquiry initially fixed was six months from the date of issue of the notification. The period of completion of the enquiry was extended first by notification dated 1-8-1990 (Annexure-F) up to 22-3-1991 and thereafter by notification dated 16-8-1991 (Annexure-L), the period was extended up to 31-3-1992. By the last notification issued on 27-3-1992 (Annexure-Q), the term stands extended up to 31-3-1993.

Hon"ble Shri Justice S. T. Ramalingam had conducted the enquiry for a considerably long period. The evidence on behalf of the State was recorded in part and the remaining evidence of the State and other parties remained to be recorded. In the meantime, since Hon"ble Shri Justice Ramalingam was due for retirement as a Judge of Madras High Court on 30-6-1991 on his attaining the age of superannuation, he wrote a letter dated 19-3-1991 (Annexure R-1 annexed with the return of the State), to the Chief Secretary of the State of Madhya Pradesh. It is necessary to reproduce verbatim the entire letter of Justice Ramalingam incorporated in Annexure R-1, as under, since comments have been offered by counsel for the parties to this petition and attempts have been made to interpret the letter in their own favour. The decision of this petition rests on the interpretation and correct understanding of the purport and effect of that letter: --

"D.O. No. 53, Jabalpur the 19th Day of March"91.

My dear Mr. Kapoor,

You are aware that the Government of M. P. has with concurrence of the President of India entrusted to me, the additional work of inquiry into the affairs of the Churhat Children Welfare Society and Lottery, in pursuance of the Judgment in M. P. No. 3899/87 in the matter of *Shri Kailash Joshi v. State of M.*

P. and ors. The progress of the work of the commission may be known from the reports sent to the Government from time to time by the Secretary. The tenure of the Commission has been extended by the Government up to 22-8-1991. The inquiry is at present at the stage of recording of evidence for the State. After the evidence for the State is over, the other parties may examine their witnesses and thereafter all the concerned parties may address the arguments to the Commission. Time shall also be required for the preparation of the report. Besides this, progress of the inquiry has frequently been hampered by unforeseen circumstances, like Parliamentary and Assembly Elections, lawyers' strikes, dislocation of air and train services etc. Then the inquiry into the additional terms of reference shall remain unbegun for the simple reason that the inquiry has been stayed by the M. P. High Court by its Order dt. 6-7-1990 in M. P. No. 1681/91. In the circumstances, therefore, it is apparent that in spite of best efforts, the inquiry may last for another one or two years or even more.

Against the aforesaid setting, I would like to inform you that I am to retire as a Judge of the High Court, Madras on 30th June 91 on superannuation. It will, therefore, be necessary for the Government of M. P. to take decision well in time, as to whether or not the inquiry has to be continued by me after my retirement. In case the Government decides well the inquiry to be continued by me then it shall be necessary for it, to work out modalities for my continuance as Commission of Inquiry, in the light of the guidelines in the matter issued by the Government of India. I have also to add that, it shall be possible for me to say yes or no to the offer for continuance as Commission of Inquiry after my retirement only after knowing the terms and conditions of such an offer. All the same, I may say that I would like to have my residence at Madras only and would also like my present official rent free residential accommodation at 31B, Green Ways Road, to be hired from the Government of Madras, for my official residence and to make provision for a car with chauffeur, fuel and maintenance at Madras till the Commission lasts. In the alternative a lump sum payment of Rs. 3,000/- (three thousand only) in lieu of the car as is provided to Judges of the Calcutta High Court, may be considered. I would also like the appointment to be for a period of 3 years or till the termination of the inquiry, whichever is earlier.

I am writing this to enable the Government to take decision well in time. I would like to request you to apprise me of the decision of the Government in the matter at the earliest.

With regards,

Yours sincerely, (S. T. Ramalingam)

To:

Shri R. P. Kapoor, IAS, Chief Secretary to Govt. of M.P. Bhopal."

The Chief Secretary, Government of Madhya Pradesh gave a reply on 9-4-1991

on behalf of the State of Madhya Pradesh as under, a copy of which has been supplied to us during the course of hearing: --

"Dated the 9th April 1991

My dear Hon"ble Justice Ramalingam,

Thank you very much for your letter No. 53 of 19th March, 1991. The issues raised in your letter regarding the tenure of the Commission and the terms and conditions after your superannuation are under active consideration of the Government and I will be in a position to inform you after a final view is taken in this case. In the meanwhile may I request that the proceedings may be continued so that the inquiry can be completed at the earliest.

With very kind regards,

Yours sincerely, Sd/- R.P. Kapoor.

Justice Shri S. T. Ramalingam, Commission of Inquiry (Churhat Children Welfare Society and Lottery) Room No. 8, Collectorate, Jabalpur-482001"

The State of Madhya Pradesh after the issuance of the above letter through its Chief Secretary, did not send any letter to Justice Ramalingam and issued notification of 10-7-1991 (Annexure-R), in exercise of powers conferred by Sub-section (3) of Section 3 of the Commissions of Inquiry Act, 1952 (hereinafter referred to as the Act"). The notification reads as under and is very relevant for decision of the present controversy :--

"Bhopal, the 10th July 1991

1-691-(8-Ka). -- Whereas an independent high power agency comprising of a single member Justice Shri S. T. Ramalingam, Judge of the Madras High Court was appointed under this Department Notification No. F.1-3-89-1(1)41. C. dated 24th February, 1989:

Whereas Justice Shri S. T. Ramalingam has retired as Judge of the Madras High Court, on 30th June 1991.

And Whereas for continuing in the said agency after retirement Justice Shri S. T. Ramalingam has placed certain terms and conditions which have not been found possible for the Government to accept.

Now therefore in exercise of power conferred by Sub-section (3) of Section 3 of the Commissions of Enquiry Act, 1952 (No. LX of 1952), the State Government hereby appoint Justice Shri G. G. Sohani, retired Chief Justice, High Court of Patna (Bihar) as single member of the said agency in place of Justice Shri S. T. Ramalingam.

Accordingly this Department Notifications Nos. F.1-3-89-1(i) E.C. Dated the 24th February 1989 (2) F.1-3-89 -(i) E.C. dated the 24th February 1989 and (3) F.1-3-89-1-E.C. dated the 24th February 1989 stand amended to this extent.

By order and in the name of Governor of M.P. S.K. Misra, Secy."

The aforesaid notification appointing Hon"ble Shri Justice G. G. Sohani, retired Chief Justice of Patna High Court, as member of the Commission in place of Justice S. T. Ramalingam was challenged by petitioner Ajay Singh in M. P. No. 2359/91 and by order passed on 30-7-1991, a Division Bench of this Court stayed the operation of the above notification restraining Justice G. G. Sohani from functioning as the member of the Commission of Inquiry. During the pendency of the above writ petition No. 2357/91, Hon"ble Shri Justice G. G. Sohani declined to continue with the assignment and tendered his resignation. The Division Bench by order passed on 5-9-1991 dismissed the said writ petition holding that it had become in fructuous as a result of the resignation tendered by Hon"ble Shri Justice G. G. Sohani.

The Chief Secretary of the State of Madhya Pradesh thereafter sent a letter on 12-9-1991 (Annexure-R-II) to Justice S. T. Ramalingam conveying to him formally the decision of the State Government of Madhya Pradesh in the following words : --

"R. P. Kapoor Chief Secretary

Dated 12 September, 1991

This is in continuation to my earlier letter No. 504/CS/91 dated 9th April, 1991 regarding the arrangement for the Commission of Enquiry (Churhat Children Welfare Society and Lottery), consequent to your superannuation as a Judge of the Madras High Court.

The State Government have considered your communications about the inconveniences you were facing in coming to Jabalpur for want of Air-link between Madras and Jabalpur. The State Government have also considered the terms and conditions mentioned in your letter of 19th March, 1991. On careful consideration of all aspects mentioned in your communications it has not been possible for the State Government to accept the terms and conditions set out in your letter of 19th March for taking up the work of the above mentioned Enquiry Commission after your superannuation. The State Government had accordingly appointed Justice Mr. G. G. Sohani, retired Chief Justice of the Patna High Court to be the single Member of the Commission. I am, however, happy to convey the deep appreciation of the State Government for the Services rendered by you in Commission in spite of all the personal inconvenience it has caused. The Hon"ble Chief Minister had made general mention of it in the Vidhan Sabha on the 4th July, 1991.

Delay in reply to your letter is regretted. It was caused because of the litigation arising out of the appointment of Justice Sohani which has since been decided.

Wishing you and your family a very happy life after your superannuation.

Yours sincerely, R. P. Kapoor.

Justice Shri S. T. Ramalingam, 31-B, Green Ways Road, Raja Annamalaipuram, Madras-28

After conveying in the aforesaid words its formal decision to Justice Ramalingam and since by the time Hon"ble Shri Justice G. G. Sohani had already resigned, the State of Madhya Pradesh issued the impugned notification (Annexure-M) on 9-1-1992, appointing Hon"ble Shri (sic) Kamlakar Choubey, retired Judge of the Allahabad High Court as a single member to preside the commission and hold the enquiry. The impugned notification (Annexure-M) reads as follows : --

"Bhopal, the 9th January 1992

No. F.1.6.91.1(8 Ka) -- Whereas in exercise of the powers conferred by Sub-section (3) of Section 3 of the Commissions of Enquiry Act, 1952 (No. LX of 1952) Justice G. G. Sohani, retired Chief Justice, High Court of Patna (Bihar) was appointed as single member of an independent high power agency constituted under this department notification No. F.1-3-89 I(i) E.C. dated 24th February 1989 in place of Justice Shri S. T. Ramalingam vide this Department Notification No. F.1. 6-91(8 Ka), dated the 10th July, 1991.

And whereas Justice Shri G. G. Sohani, retired Chief Justice, High Court of Patna (Bihar) as since withdrawn his consent to work as single member of the said agency;

Now, therefore, in exercise of the powers conferred by Sub-section (3) of Section 3 of the Commissions of Enquiry Act, 1952 (No. LX of 1952), read with Section 21 of the General Clauses Act, 1897, the State Government hereby appoint Justice Shri Kamlakar Choubey, retired Judge of the Allahabad High Court as single member of the said agency in place of Shri G. G. Sohani.

Accordingly this department Notifications Nos. (1) F.1-3-89-(i) E.C. dated 24th February 1989, (2) F.1-3-89-1(i) E.C. dated 24th February 1989 and (3) F.1-3-89-I(i) EC. dated 24th February 1989 shall stand amended to this extent.

By order and in name of the Governor of Madhya Pradesh SUSHMA NATH, Secy."

Hon"ble Shri Justice Kamlakar Choubey, the newly appointed member of the Commission has been appointed on terms and conditions contained in the memorandum of the General Administration Department of the State of Madhya Pradesh dated 23-3-1991, (a copy of which is on record as Annexure-P with the additional rejoinder of the petitioner). The terms and conditions of the appointment of Justice Kamlakar Choubey amongst others allow him to have his camp office at Varanasi with the following staff: --

- (1) Private Secretary One
- (2) Personal Assistant One
- (3) Jamdar One
- (4) Peons Two

(5) Peons (on daily wages) Two

Apart from above terms, it is provided that Hon"ble Shri Justice Kamlakar Choubey will get, as a member of the Commission, emoluments equivalent to the amount of his salary as a Judge of the High Court minus the amount of actual pension received by him on his retirement. He would be entitled, as per High Court Judges Rules, to vehicle allowance admissible to a Judge. He will also be entitled to have a telephone at Varanasi for the work of the Commission and payment of Rs. 1,000/- will be made towards telephone charges. Whenever Justice Choubey would be visiting Jabalpur or Bhopal on the work of the Commission, he would be treated as State Guest with all facilities in that capacity. He would also be entitled to travelling allowance and daily allowance as per rules.

Shri Kapil Sibbal, learned counsel appearing for the petitioner assails the impugned notification dated 9th January 1992 on grounds inter alia that retirement of Hon"ble Shri Justice S.T. Ramalingam as a sitting Judge of the Madras High Court and writing by him of a letter dated 19-3-1991 to the Chief Secretary, State of Madhya Pradesh, with a view to get his terms and conditions of working, as a member of the Inquiry Commission refixed or revised, did not give any legal justification or authority to the State Government to appoint by substitution another member of the Commission. The power u/s 3(3) of the Act could not have been exercised, as there existed no vacancy in the membership of the commission.

The learned counsel appearing for the petitioner argues that the action of the State Government is a glaring instance of "malice in law". Statutory power u/s 3 of the Act is said to have been exercised for an alien purpose not warranted by the aforesaid provision. It is argued that retirement of Justice Ramalingam as a sitting Judge of Madras High Court had no connection whatsoever with his tenure as a member of the Inquiry Commission. The retirement of Justice Ramalingam, therefore, did not create any vacancy and did not disqualify him to continue as a member of the Inquiry Commission. It is also submitted that the letter dated 19-3-1991 (Annexure R 1) cannot be read, by any reasonable interpretation of the contents of the same, to be a letter of resignation or his express unwillingness to continue with the enquiry. There was, therefore, neither any justification in law nor occasion to substitute him by appointing another member. The learned counsel contends that power to appoint a member of the Commission and fill a vacancy arising in its membership is governed by the provisions of Section 3 and Section 3(3) of the Act and the State Government can claim no arbitrary and uncanalized power outside the provisions of the Act to nullify the appointment of a member of the Commission in the midst of the enquiry when there was no vacancy either by resignation, death or by any other similar cause. Any other interpretation to the provisions of Section 3 in the scheme of the Act, the learned counsel urges, would be subversive of the independence and impartiality of the member heading the Commission. The

learned counsel submits that here the enquiry was set up by appointing a "High Power Agency" under the orders of the High Court in a public interest litigation. The enquiry, therefore, was set up by issuance of notification u/s 11 of the Act and all powers of a statutory Commission appointed u/s 3 have been conferred. The member appointed to such an enquiry cannot be changed or substituted at the whim and caprice of the State Government.

Commenting on the letter of Justice Ramalingam sent to the Chief Secretary to Government of Madhya Pradesh, on 19-3-1991, the learned counsel submits that thereby the Hon"ble member had merely asked the Government to offer terms and conditions under which he had to continue the enquiry after his retirement. In that letter he had merely expressed his expectations and had not conveyed that only on the terms and conditions suggested by him, he would accept the continuance of the assignment and not without them. It was therefore, not open to the State Government to say that the terms and conditions offered by Justice Ramalingam were unacceptable and make appointment of another member in his place. Reliance is placed on a decision in the case of Jayantbhai Manubhai Patel and Others Vs. Arun Subodhbhai Mehta and Others, Paragraph 15 at page 1295, in support of the contention that the power to change the membership of the commission has not been exercised for bona fide purpose. In support of his argument that this is an instance of malice in law, reliance is placed on the following decisions : -

(1) Mahabir Auto Stores and Ors. v. Indian Oil Corporation and Ors. 1190(3) SCC 752.

(2) Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another,

(3) Ram Chandra Chaudhuri Vs. Secretary to Govt. of West Bengal and Others,

We have heard at length Shri N. C. Jain, Advocate General appearing for the State who in his reply supported the impugned notifications on grounds and reasons other than those mentioned in it. His argument is that a vacancy had arisen in the membership of the commission for several reasons. Taking into consideration the cumulative effect of the circumstances, a decision was taken to relieve Justice Ramalingam of the assignment and to appoint in his place another member. Apart from the letters exchanged between the Chief Secretary to the Government of M. P. and Justice Ramalingam, reference has been made to an earlier letter of Justice Ramalingam dated 14-7-1990 in which he had complained about the inconvenience which was being caused to him because of non-availability of direct air travel facility between Madras and Jabalpur. He had mentioned about his last journey trips for holding the sittings of the Commission and has at one place in his letter used the expression "I lose my enthusiasm and get depressed due to the cancellation of Vayudoot flights." He, therefore, suggested that the Government should use its good offices and influence to re-start the air service, but at the same time he conveyed his decision to have sittings of the Commission from 20th September, 1990 onwards at Bhopal.

Commenting on the above letter of 14-7-1990, the learned Advocate General submitted that there were several negative factors for discontinuance of the membership of Justice Ramalingam as a member of the Commission. Firstly, he had retired on 30-6-1991. Amongst other facilities, he had asked for a rented official residence at Madras at the cost of the State of M. P. He was himself experiencing great inconvenience in undertaking journey by train to Jabalpur and Bhopal and was insisting on resumption of air (ravel facilities. He had to suffer great ordeal in undertaking journey in the past, so much so that one time he expressed to have "lost enthusiasm and got depressed". He was not Hindi knowing Judge and for that reason there were some practical difficulties experienced by him and the parties as also the witnesses in the Court of the enquiry. The learned Advocate General argued that all these circumstances were taken into consideration by the State Government to treat the letter dated 19-3-1991 of Justice Ramalingam as his "implied resignation" and thereby, according to the learned Advocate General, "implied vacancy" was created justifying the State Government to invoke the power of supplying the vacancy u/s 3 of the Act. Lest the plea of the Government and the stand taken by it in the argument be misunderstood, wr hereby quote the specific stand taken by the State Government in its return and additional return as under : --

"It so happened that Justice Shri S. T. Ramalingam was to ling the journey from Madras to Jabalpur as too tiresome. Jabalpur was not connected by air. At his request the State Government of Madhya Pradesh took up the matter with the Central Government but with no positive response. As against the initial decision of the Government for having the Headquarter at Jabalpur he had suggested that die headquarter should also be kept at Bhopal. His troubles in the journey and stay could be realised and appreciated by the Government but his problems lay beyond the power of the State Government to solve."

"These were the new terms and much different from the old one. The Government of Madhya Pradesh was asked to work out the modalities in the light of the guidelines in the matter issued by the Government of India. The Government felt that such terms will be too onerous to accept. It has been stated above that the Judges are esteemed with great reverence by this Government and it was not felt proper to make any bargain in respect to the terms set up by Mr. Justice Ramalingam. The question was, therefore, seen both by Justice Ramalingam and the Govt. from this angle that Justice Ramalingam has set down his new minimum terms on the cessation of his old term on his retirement and he was not disposed to work in the Commission unless the terms were revised as per his letter. Thus, even u/s 3A, it is a case covered within the expression "for any other reason". This was treated as vacancy or at any rate, an implied vacancy and consequently, the appointment of Shri Justice Sohani, former Chief Justice of Patna High Court, an eminent Jurist and a Judge of Highest esteem was made."

The plea with regard to implied resignation in the return in paragraph 10 is in the

following words : --

"Questions have been raised about the modalities in accepting or not accepting the terms set down in Annexure R-1. It is an individual matter with different persons as to how he has to act under the given circumstance since Justice Ramalingam had set down certain terms which were not possible for the Government to agree to, his letter has to be treated as his implied resignation. It may further be added that this Government had never any disrespect for Justice Ramalingam."

The other limb of the argument on behalf of the State by the Advocate General is that Justice Ramalingam was chosen to head the commission as single member being a sitting Judge of another High Court in terms of the express resolution of the Government notified in the public gazette of 24-2-1989 (Annexure-A). The decision to appoint a sitting Judge of another High Court was deliberately taken since the words used in the direction were for appointment of a "High Power Independent Agency". The argument is that the appointment of Justice Ramalingam on the Commission of Enquiry was qua his status as sitting Judge and his retirement as the sitting Judge created a vacancy in the office of the member of the Commission. The learned Advocate General argued that this is how the then Government of the Congress party, in setting up the Commission, understood the High Court directions and the petitioner himself as is clear from the averments made by him in his petition in paragraphs 5 to 8. Justice Ramalingam himself is stated to be of the same view, as is clear from the tenor of his letter dated 19-3-1991 (Annexure R-1). The submission is that retirement of Justice Ramalingam as Judge of Madras High Court was an occasion for his re-appointment on different terms and conditions for continuing the proceedings of the Commission and that led him to suggest his terms and conditions to continue with the assignment. There was thus a vacancy created on retirement of Justice Ramalingam as a Judge and the State Government, therefore, had the choice to either accept his terms and conditions or to reject them. The State Government, taking into consideration all the relevant factors such as the onerous conditions offered by him, journey difficulties he experienced and his lack of knowledge of Hindi, took a decision to relieve him of the assignment and appoint another member in his place.

In support of his argument that there was occasion to exercise power u/s 3 of the Act, the learned Advocate General alternatively submitted that aid, for exercise of power u/s 3(3) of the Act could be taken from Section 16 of the General Clauses Act, which provides that power to make appointment includes power to suspend or rescind the same and the word "Dismissed" used in Section 16 of the General Clauses Act, has to be understood in wider sense to include within it cessation of the appointment by any other modes. For the above proposition based on Section 16 of the General Clauses Act, support is sought from the following decisions : --

(1) Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and

Others,

(2) Workers Employed in Hirakud Dam Vs. State of Orissa and Another,

(3) Dr. Bool Chand Vs. The Chancellor, Kurukshetra University,

(4) Cooper v. Wileon, (1937)2 All E.R. 7261.

(5) Province of Bombay Vs. Kusaldas S. Advani and Others,

(6) Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others,

(7) Kamla Prasad Khetan Vs. The Union of India (UOI),

Lastly, the learned Advocate General in his reply submitted that Enquiry Commission is not a court. It is a proceeding of inquisitorial and not of accusatorial nature. There is no lis between the parties and it has no power to give any definitive judgment. It is set up to enquire, investigate and then report on a matter of public importance to inform the mind of the Government for consequent action, if any, felt expedient by the Government. Reference is made in this behalf, on the question of nature of the proceeding of the commission, to the following decisions : --

(1) M. V. Rajwade v. Dr. S. M. Hassan and Ors. 1954 NLJ 245 : AIR 1954 Nag 71.

(2) Puhupram and Ors. v. State of M. P. and Ors. 1968 MPLJ 629.

(3) Dr Baliram Waman Hiray Vs. Justice B. Lentin and Others,

(4) Md. Ibrahim Khan Vs. Susheel Kumar and Another,

Elucidating further his argument on the above aspect, the submission of the learned Advocate General on behalf of the State is that the State is the sole judge in the matter of choice of forum and the member whose services it will employ, for the purpose of holding an enquiry and such a power expressly exists u/s 3 of the Act, read with Section 16 of the General Clauses Act. It is submitted that for the purpose of holding an enquiry all the three honourable Judges were equally competent and independent, and substitution of one by the other, for relevant reasons mentioned above, cannot be said to be an exercise of power based on any malice. According to the Advocate General, therefore, appointment of Justice Kamalakar Choubey in place of Justice Ramalingam for completing the half finished enquiry by the latter, cannot be questioned.

We have also heard and bestowed due consideration to the submissions made by Shri N. S. Kale, learned counsel appearing on behalf of the intervener Shri Kailash Joshi. The argument on behalf of the intervener is that Section 3(3) of the Act is not the sole repository of the power to appoint a member to the Commission. There is an implied power to achieve same legitimate and by legal means. The learned counsel for the intervener traced the source of power not only from Section 3(3) of the Act, which contemplates filling of a vacancy but

from Section 3(2) of the Act, which confers power of appointment of a member or members on the Commission. The learned counsel for the intervener supported the impugned notification urging that the State had power to make another appointment in place of Justice Ramalingam u/s 3(2) of the Act read with Section 14 of the General Clauses Act. According to him Section 14 can be taken aid of to support the notification because if a provision in an enactment confers power then unless a different intention appears that power may be exercised from time to time as occasion requires. It is argued that there definitely arose an occasion to relieve Justice Ramalingam and to appoint Justice G. G. Sohani and then Justice Kamlakar Choubey in his place for the reasons already mentioned in the reply of the Advocate General. The argument on behalf of the intervener is that in fact the question of appointment of a member to the Commission and effecting change in it is not a matter justiciable as the matter rests solely within the choice and discretion of the State Government which sets up an enquiry for information of its mind. The learned counsel argued that this Court cannot compel the State Government to accept the onerous terms offered by Justice Ramalingam for his continuance as a member of the Commission and it would be open to the State Government to reject the offer and relieve the member. Any other interpretation of the provisions of the Act would be that a member once appointed would have volition to continue or not on the Commission without any corresponding power with the State and such would be a situation making it a matter of unilateral choice or power with the member concerned. Such exclusive power cannot be inferred to exist with a member of the Commission even though duly appointed. In support of his argument, the learned counsel for the intervener referred to the statement of objects and reasons of the Commission of Enquiry (Amendment Bill), 1967 and the recommendations of the Law Commission which resulted in amendment of the Act by introduction of Section 3(3) and Section 8A in the same. Reliance is placed on the decision in the case of *I. T. Officer Cannanore v. M. K. Mohammad Kunhi* AIR 1969 SC 430.

The last submission on behalf of the intervener is that the petitioner has no locus standi to challenge the notification regarding change of member of Commission because it is not open to the petitioner to insist that a particular member alone should hold the enquiry and hence cannot be said to be an "aggrieved person".

Shri Kapil Sibbal, learned counsel appearing for the petitioner in his counter reply submitted that resort to provisions of Section 14 and Section 16 of the General Clauses Act cannot be made in view of a "different intention" appearing in the scheme and the provisions of that Act. So far as the argument of the other side, by taking aid of Section 16 of the General Clauses Act is concerned, the reply on behalf of the petitioner is that that provision is restricted to an appointment where there is relationship of master and servant between the parties. It can have no application to statutory functionary like an enquiry commission or a Court which cannot be treated to be an appointee as an employee of the State Government. The provision of appointment of member to the Commission in

Section 3(2) of the Act and of change or his substitution in Section 3(3) of the Act contain an express "different intention" within the meaning of that expression in Sections 14 and 16 of the General Clauses Act. Similarly, in reply to the argument of intervener, the submission made is that provisions of Section 3(2) cannot be exercised with the aid of Section 14 of the General Clauses Act to oust a member in office in the midst of the enquiry. Any other interpretation to the provisions of Act and Sections 14 and 16 of the General Clauses Act, so as to infer such arbitrary power with the State Government would be, according to the petitioner, subversive of the character and status of Commission as an impartial and independent body set up to investigate and report on a matter of public importance. The learned Counsel for the petitioner sought to distinguish the cases cited by the Advocate General on behalf of the State on Section 16 of the General Clauses Act and read them before us to show that they relate to matters of appointment of an employee or an authority or person with master and servant relationship. Such is said to be not the case with an enquiry commission, regulated by the provisions of the Act.

On the question of locus standi, raised on behalf of the intervener, the learned counsel for the petitioner stated that such an argument is not open to an intervener. It is submitted that the petitioner whose conduct is being investigated in the commission is aggrieved person and can question the change in the constitution of the Commission which is contrary to law. It is submitted that the petitioner is not interested in a particular individual to head the Commission, but it can certainly question the action of the State Government in effecting a change in the membership of the Commission for no valid and justifiable reason when it has performed substantial part of its functions.

The first contention of the learned Advocate General, on behalf of the State that the letter dated 19-3-1991 by Justice Ramalingam was a letter of "implied resignation" and hence there was an "implied vacancy" deserves out right rejection. As a matter of fact we fail to understand the meaning and concept of "implied vacancy", which has been evolved in the pleadings of the State and the argument on its behalf. Either there is a resignation or not, but the letter which does not from its clear words can be read as resignation, cannot be held to be so by implication. Vacancy" has nowhere been defined in the Act and purposely because it is incapable of precise definition as to cover all contingencies and situations in which an office or post can be said to be vacant. "Vacancy in office" refers to offices which on account of death, resignation or abandonment, by previous holders or some other cause, have in fact no incumbent. (See Words and Phrases Permanent Edition, Volume 43-A, page 496).

A proposal invited by the incumbent of the office to refix his terms and conditions of his contigence in office, does not take away the existing rights of the incumbent to hold the office. Rejection of his proposal regarding terms and conditions by itself cannot create actual or deemed vacancy in the office of the incumbent till the incumbent expresses his unwillingness to work or discharge

the functions of the said office. It would be absurd to read the above letter of Justice Ramalingam as one of resignation or "Implied resignation" as its plain language does not warrant such construction. From the contents of the letter it is clear that Justice Ramalingam merely desired the State of Madhya Pradesh to reconsider the terms and conditions of his functioning as a member of the Commission after his retirement as a Judge of the High Court. In fact he had invited the attention of the State of Madhya Pradesh to the matter with request to make concrete proposal about his terms so that he may agree or disagree to continue with the assignment. He nowhere stated in the letter that he would agree to continue with the work only if the terms and conditions suggested by him are agreed to by the State or that he would accept no less than what he expected. In one portion of the letter, he very categorically reserved a right to accept or reject the assignment only after getting specific proposal from the State Government.

We fail to understand why the Government was shy or felt embarrassed for the reason it has described as its disinclination to engage "in bargaining with a Judge". It was open to the State Government at that stage itself to outright reject the proposal or the suggestion by a formal communication to him as was in fact done by issuing a notification on 10-7-1991 (Annexure-H), appointing Justice G. G. Sohani in his place and stating therein by use of express language that the Government was "unable to accept the terms and conditions" suggested by Justice Ramalingam. Whether the manner adopted by the State Government could have been more courteous, is neither relevant nor needs any comments. Mere rejection of the terms suggested or proposed cannot result in vacancy in the office of the Commission till the holder of it has not stepped down or expressly abandoned the work or refused to undertake it in any other manner. The holder of the office, on being informed of the views of the State Government on the terms of his continuance, may have agreed to work or refused. If he had agreed, there was no vacancy, but if he would have refused, a vacancy would have been created justifying its filling in exercise of powers u/s 3(3) of the Act. The State Government was incompetent to take a unilateral decision by refusing to refix his terms and conditions and treat his letter as creating a vacancy, requiring change of the constitution of the Commission in the midst of the enquiry. There was nothing wrong or unnatural for the Judge to have written to the Government to fix his terms and conditions consequent to his retirement as a judge; because as a sitting Judge he was entitled to salary with all the allowances as a Judge and was not to get any extra remuneration for the work of the Commission, by virtue of the letter dated 23-2-1989 (Annexure-AA), which conveyed to him the request of the President in terms of paragraph 11(b) (i) of part "D" of the Second Schedule to the Constitution of India. By the aforesaid letter, the period spent by him while functioning as a member of the Commission, although outside his duties as a Judge, was liable to be counted as period spent in "actual Service" within the meaning of the aforesaid Schedule of the Constitution.

We do not find any support in the provisions of the Act or the various notifications and orders of the State Government, in the matter of the present Commission, for the argument of Shri Sibbal, learned counsel for the petitioner that the letter of Justice Ramalingam dated 19-3-1991 was ill-advised, as even after his retirement, he was entitled to continue on the same terms and conditions as a member of the Commission. According to us, occasion did arise for re-fixing his terms and conditions to continue on the enquiry commission after his retirement as a Judge and the Judge rightly invited the attention of the State Government to the said fact.

The second question that arises for decision is whether the retirement of Justice Ramalingam as Judge of Madras High Court resulted in a vacancy in the office of the Commission. Much emphasis has been laid by the learned Advocate General on the letter dated 23-2-1989 (Annexure-AA) referred to above conveying the request of the President of India in terms of paragraph 11(b)(i) of part "D" of the Second Schedule of the Constitution of India.

Learned Advocate General also laid special emphasis on the contents of the original notification of the State Government of February 1989 (Annexure-A) to contend that by it, it was resolved to set up an enquiry through an independent High Power Agency, meaning thereby, of a sitting Judge of the High Court. Attention of the Court was invited by the learned Advocate General to the pleadings in paragraphs 7 and 8 the petition and comments have been made on the letter of Justice Ramalingam dated 9-3-1991 to support his argument in this regard. It is argued that the petitioner and Justice Ramalingam himself, as his letter discloses, were of the opinion that the resolution of the Government was to appoint a sitting Judge of the High Court only on the Commission and, therefore, his retirement had created a vacancy.

The above argument, in our opinion is fallacious. Even accepting the contention that Justice Ramalingam was selected for appointment to be a sole member of the Commission, being a sitting Judge of the High Court, in deference or directions of the Madhya Pradesh High Court, it cannot be held that the tenure of the member of the Commission was to last only till he continued to be a sitting Judge. The "High Power Independent Agency" of the sitting Judge set up by a notification issued u/s 11 of the Act is "deemed to be a Commission" for all statutory and practical purposes and would thereafter be governed by the provisions of the Act. The tenure of the member of the Commission to continue qua member would, therefore, be regulated by the Act and has no connection or relevance with his tenure as a High Court Judge. The resolution of the Government contained in its original notification dated 24-2-1989 (Annexure-A) the stand of the petitioner as contained in the relevant portion of the pleadings in the petition or the misunderstandings, if any, which Justice Ramalingam may have, about his status and tenure do not change his legal status and tenure as a member of the Commission. We have no doubt in our minds in holding that one appointed to head the Commission, as a sole member at the time when he was a

sitting Judge, his retirement did not result in his automatic ouster from the office. His tenure as a member of the Commission depends on the notification appointing him and fixing his tenure which was initially for six months, then extended up to March 1992 and now stands extended up to March 1993. We are also of the view that the request of the President contained in letter Annexure-AA in terms of paragraph 11(b)(i) of part "D" of the Second Schedule of the Constitution was only with a limited purpose that Justice Ramalingam while functioning on the Commission -- his absence from duty as a Judge would be treated to be a period in "actual service" to enable him to get his salary as a Judge. This was necessitated because he was not to get any extra remuneration for functioning as member of the Commission. We derive sufficient support in our view from the decision in the case of Semaruram Holiram v. B. K. Choudhary AIR 1953 Nag 331 and particularly paragraph 15 therein, which reads as under : --

"(15) It would appear from this that if a Judge undertakes the performance of other functions he runs the risk of having the period of such occupation counted against him for his salary. There is no other consequence contemplated since the definition is only for Part D and not generally for any other purpose. The logical consequence of this is that a Judge is entitled to refuse to accept any other duty unless the President requests him, even though the request may be from the State or Union Government; but it does not follow that if he undertakes any other duty he ceases to be a Judge of the High Court or as in the present case, his appointment validly made under the Commissions of Inquiry Act can be questioned.

The last question that needs decision is whether the letter dated 19-3-1991 of Justice Ramalingam furnished a ground to change the constitution of the Commission by change of its member even if there existed no vacancy. The answer to aforesaid question requires examination of the Scheme of the Act and the correct interpretation of the provisions contained in Section 3(3) and Section 3(3) read with Sub-sections (1) and (2) of Section 8A of the Act. We have already held above that a "High Power Independent Agency" set up by appointment of a High Court Judge, on issuance of notification u/s 11, conferring upon it all the powers under Act, for all statutory and practical purposes would be a "Commission" regulated by the provisions of the Act. The provisions contained in Section 3(2) and Section 3(3) and Sub-section (1) and (2) of Section 8A would, therefore be applicable to such a Commission. Sub-sections (2) and (3) of Section 3 of the Act operate in two different fields. Sub-section (2) refers to initial appointment and as has been argued on behalf of the intervener, may apply to appointments of Commissions made from time to time with the aid of Section 14 of the General Clauses Act. Sub-section (3) of Section 3 envisages an appointment in the event of a vacancy in the membership of the Commission. As has been held by us above, Sub-section (3) could not have been resorted to by the State as neither the retirement created vacancy nor was there any resignation from his office by Justice Ramalingam.

The further question -- that arises is whether Sub-section (2) of Section 3 could have been resorted to by the State Government to change the constitution of the Commission by appointing a new member although there existed no vacancy. The learned counsel for the intervener, to support his submission sought aid from Section 14 of the General Clauses Act and Section 8A of the Act. Section 8A of the Act reads as under : --

"8-A Inquiry not to be interrupted by reason of vacancy or change in the constitution of the Commission.-- (1) Where the Commission consists of two or more members, it may act notwithstanding the absence of the Chairman or any other member or any vacancy among its members.

(2) Where during the course of an Inquiry before a Commission, a change has taken place in the constitution of the Commission by reason of any vacancy having been filled or by any other reason, it shall not be necessary for the Commission to commence the inquiry afresh and the inquiry may be continued from the stage at which the change took place.

Reading Section 3(2) and Section 8-A(2) conjointly we are of the opinion that the State Government may reconstitute a commission by change of its member for any reason other than arising from a vacancy. It is important to note that Sub-section (2) of Section 8A quoted above envisages a change in constitution of the Commission by reason of any vacancy or by any other reason so that the inquiry may be continued from the stage at which the change took place. We are therefore, in agreement with the contention advanced by the learned counsel for the intervener that apart from the reason of any vacancy arising in the membership of the commission, the constitution of the commission by change of its member is permissible by the State Government in exercise of power u/s 3(2), read with Section 8A(2) of the Act.

In the case before us, however, the impugned notification (Annexure-M) which is based on the notification dated 19-7-1991 (Annexure-H) has been expressly issued in exercise of power under Sub-section (3) of Section 3 of the Act, stating therein the reason for change of membership of the commission, to be one that the terms and conditions offered by Justice Ramalingam after his retirement have not been found acceptable to the Government. The above notification making a change in the membership of the commission, expressly issued u/s 3(3) of the Act and for the reason stated therein, cannot be supported on the basis of additional reasons and resort to power contained in Sub-section (2) of Section 3 read with Section 8A(2) of the Act.

The reasons for change of membership in the aforesaid notification appointing first Justice G. G. Sohani and thereafter Justice Kamalakhar Choubey cannot be enlarged or substituted by additional reasons now supplied by State in its nature. (See *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*,

Even otherwise we do not find any relevant valid reason providing legal

justification for change in the constitution of the Commission, headed by Justice Ramalingam. As we have commented above on the letter of Justice Ramalingam dated 19-3-1991, he had merely invited certain proposals from the Government for re-fixation of his terms and conditions and had not given any ultimatum or notice proposing any hard and fast terms below which he would not be prepared to work. The above letter in itself, without any response from the State Government, furnished no reasonable and valid ground to relieve Justice Ramalingam as member of the Commission in the midst of the enquiry. It is true that Commission is not a "Court" in the strict sense of that term but we cannot lose sight of the fact that a member of the Commission is a statutory functionary and has been conferred with such extraordinary powers as that of a "Court" for conducting an enquiry effectively in an independent and impartial manner. It cannot also be lost sight of that the Commission in the present case was not an ordinary commission appointed u/s 3 of the Act, either by the State Legislature or by order of the State Government. It was a commission set up on the directions of the High Court of Madhya Pradesh issued in a writ petition. It was not possible for the State Government even to abolish the Commission by issuance of notification u/s 7 of the Act. It was, therefore, only on valid and reasonable grounds that the constitution of the Commission could be changed.

So far as the other reason offered, such as that the Judge being from South -- is a non-Hindi knowing person and that could have created difficulty in conduct of the enquiry was well known to the State Government when he was initially appointed as the sole member. The judge in spite of his handicap of language has done substantial part of the work. Similarly the other reason, such as want of travel facilities by air and occasional inconveniences caused and conveyed by him to the Government in the past, cannot, in our opinion, be such a reason necessitating the State Government to relieve him of the assignment. It is on these reasons put forth by the State Government, we have to decide whether the action of the State Government suffers from any "malice in law". We may make it clear that malice in fact has neither been alleged nor found by us. The learned Advocate General was very clear in submitting that so far as the work of the commission is concerned, all the three Hon"ble Judges were equally competent to undertake the assignment and there was no disrespect shown to any of them. Malice in law has been explained in his classic passage by Hon"ble Shri Justice V. R. Krishna Iyer in the case of State of Punjab and Another Vs. Gurdial Singh and Others, Paragraph 9 at page 321. "Legal malice" has been explained therein to mean colourable exercise or fraud on power and often times overlaps motives, passions and satisfactions -- is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal.

Learned counsel for the intervener very strongly submitted that the choice of the State Government, whom to appoint as a members and when to change him in the matter of an inquiry, is not justiciable. It is true that the Court has no jurisdiction to substitute its own view for the one formed by the State Government. The only question to be considered by us would be whether the

authority vested with the power has taken into consideration circumstances, events or matters wholly extraneous to the purpose for which the power is vested or it has been used for collateral purpose.

As we have held above, the reason for change in constitution of the Commission, as disclosed in the notification, cannot be substituted or supplied by additional reasons. In any case the additional reasons such as travelling difficulties experienced by the Judge, his lack of Knowledge of Hindi and proposals or suggestions made by him in the matter of fixing his terms and conditions of continuance, in his letter of 19-3-1991 did not furnish any relevant or reasonable grounds to the State Government to relieve him and substitute other member in his place, even before conveying to him the terms and conditions which would have been acceptable to the Government.

In view of the aforesaid discussion we do not think it necessary to decide the point urged by the Advocate General that apart from the arising vacancy in the office of the Commission, its constitution can be changed with the aid of Section 16 of the General Clauses Act.

Now remains for decision the plea of locus standi raised on behalf of the intervener. The objection deserves only a mention and summary rejection. It is too much to say and that too on behalf of only an intervener in the petition, that the petitioner, whose conduct is also under investigation, who is an active participant in the inquiry and is likely to be adversely affected by it, has no focus standi to question the legality of constitution or change in the Commission of Inquiry.

As result of the aforesaid discussion, the petition succeeds and is hereby allowed. The notification dated 10-7-1991 (Annexure-H) and the consequent notification based thereon dated 9-1-1992 (Annexure-M) are hereby quashed. It is open to the State Government to propose to Hon''ble Shri Justice S.T. Ramalingam the terms and conditions for his continuance as a member of the Commission equivalent to, less or more favourable than those offered and fixed for Hon''ble Shri Justice Kamlakar Choubey. Thereafter depending on his reply the State Government may continue or discontinue his appointment or substitute another member in his place. It is also made clear that it would be open to Justice Ramalingam to accept the terms and conditions offered by the State Government, Madhya Pradesh or to resign from the office, by taking a decision in the behalf early, so that the work of the Commission is not unduly hampered and it is completed well within the extended period i.e. before 31st March 1993. The petitioners shall get costs of the petitions. Counsel''s fee shall be Rs. 1,000/- (Rs. One thousand) each, in the two petitions, if certified. The amount of security if deposited, be refunded to the petitioners.